

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KEVIN CHARLES SUTHERBY,

Defendant-Appellant.

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UNPUBLISHED

December 28, 2010

No. 293826

Wayne Circuit Court

LC No. 08-0138482-FC

Before: SHAPIRO, P.J., and SAAD and K.F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC), MCL 750.520b(2)(b) (under 13),<sup>1</sup> and the trial court sentenced defendant to 25 to 50 years in prison. For the reasons set forth below, we affirm.

I. DOUBLE JEOPARDY

Defendant's first jury trial ended in a mistrial on April 2, 2009, as a result of a hung jury. Defendant claims that he was tried twice in violation of the double jeopardy clause because, after the first trial, the court improperly declared a mistrial without consent or manifest necessity.<sup>2</sup>

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<sup>1</sup> The jury also found defendant guilty of second-degree CSC. However, the charge of second-degree CSC was in the alternative and defendant and the prosecutor agreed that the count should be dismissed. Accordingly, at sentencing, the trial court dismissed the count of second-degree CSC.

<sup>2</sup> We review constitutional questions de novo. *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009). A trial court's decision to declare a mistrial because of a deadlocked jury "is accorded great deference." *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002), habeas corpus gtd 507 F Supp 2d 777 (ED Mich, 2007), aff'd 316 Fed Appx 421 (CA 6, 2009), rev'd \_\_\_ US \_\_\_, 130 S Ct 1855; 176 L Ed 2d 678 (2010). At most, appellate consideration of the matter depends on a "determination whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict." *Id.*, citing *People v Duncan*, 373 Mich 650, 661; 130 NW2d 385 (1964). This Court should consider whether the trial court abused its discretion in finding manifest necessity to declare a mistrial based upon a deadlocked jury. *Id.* at 220.

“A person may not be twice placed in jeopardy for a single offense.” US Const, Am V; Const 1963, art 1, § 15; *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). “When a defendant exercises his right to trial by jury, jeopardy generally attaches when the jury is selected and sworn.” *Mehall*, 454 Mich at 4. “If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared due to manifest necessity.” *Id.* Manifest necessity requiring a mistrial occurs when the jury fails to reach a unanimous verdict. *Id.* When a jury fails to reach a unanimous verdict, jeopardy has not terminated because “there has not been an assessment of the sufficiency of the prosecution’s proofs.” *Id.* at 5.

A trial court must exercise caution in discharging a jury before it has reached a verdict. *People v Lett*, 466 Mich 206, 221; 644 NW2d 743 (2002), habeas corpus gtd 507 F Supp 2d 777 (ED Mich, 2007), aff’d 316 Fed Appx 421 (CA 6, 2009), rev’d \_\_\_ US \_\_\_; 130 S Ct 1855; 176 L Ed 2d 678 (2010). In deciding whether a mistrial is warranted, a trial court is not required to examine the alternatives or make factual findings of manifest necessity on the record, nor must it sua sponte instruct the jury to resume deliberations. *Id.* at 221. However, the basis for a mistrial order must be adequately disclosed in the record. *Id.* at 222.

We hold that the trial court did not abuse its discretion in declaring a mistrial on the basis of the manifest necessity of a deadlocked jury. The jury deliberated for approximately seven and a half hours, during which time it sent multiple notes to the trial court asking to rehear evidence and instructions. In addition, the jury sent two notes to the trial judge declaring its inability to reach a verdict. Finally, the foreperson of the jury indicated to the trial court that the jury would be unable to reach a verdict. The trial court gave a deadlocked jury instruction, but the jury remained unable to make a decision. Therefore, the trial court did not abuse its discretion in declaring a mistrial. As a result, defendant was not improperly retried in violation of the double jeopardy clause.

Defendant argues that there was no manifest necessity because the trial court did not establish on the record the reasons for declaring the mistrial and did not hold a hearing regarding its decision to declare a mistrial. The Michigan Supreme Court explicitly decided in *Lett* that when a mistrial is declared on the basis of a hung jury, the trial court is granted deference and it need not make explicit findings of fact on the record. *Lett*, 466 Mich at 222. Therefore, the trial court did not abuse its discretion in failing to hold a hearing regarding the declaration of a mistrial or seek alternatives to the declaration of a mistrial.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant claims that the prosecutor presented insufficient evidence to convict him of first-degree CSC.<sup>3</sup> A person is guilty of first-degree CSC if he engages in sexual penetration

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<sup>3</sup> When analyzing a claim based on insufficient evidence, we review the record de novo. *People v Mayhew*, 236 Mich App 112, 132; 600 NW2d 370 (1999). We view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007).

with another person and the other person is under the age of thirteen. MCL 750.520b(1)(a); *People v Szalma*, 487 Mich 708, 725; 790 NW2d 662 (Docket No. 140021, decided August 26, 2010), slip op, p 7. “Sexual penetration” includes any “intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body. . . .” MCL 750.520a(r); *Szalma*, 487 Mich at 725. Circumstantial evidence and reasonable inferences drawn from it may establish the elements of a crime. *People v Whitehead*, 238 Mich App 1, 14; 604 NW2d 737 (1999).

We hold that the prosecutor presented sufficient evidence for a rational trier of fact to find the elements of first-degree CSC beyond a reasonable doubt. Defendant does not dispute that the victim was 12 years old on the date of the crime. Moreover, circumstantial evidence established that defendant sexually penetrated the victim. Evidence showed that the victim passed out in the basement of her mother’s boyfriend’s house while drinking alcohol at defendant’s bachelor party. She awoke hours later in an upstairs bedroom lying on an air mattress next to defendant. Both she and defendant were naked. The victim could not remember how she got there, but she awoke feeling sore in her vaginal area and she found blood between her legs and on the sheets. The victim testified that she was not menstruating at that time. Further, when the victim confronted defendant weeks later with the possibility that she might be pregnant, defendant did not deny that he had sex with her. Instead, defendant implicitly admitted that he sexually penetrated the victim by telling her that she could not be pregnant because he had undergone a vasectomy and that he would die if the victim told her family what happened. There was clearly sufficient evidence to support defendant’s conviction.

### III. RECORDED CONVERSATION

Defendant maintains that the trial court erred when it admitted a recorded conversation between the victim and defendant because it was not an admission, and because it was incomplete, immaterial, irrelevant, and the danger of unfair prejudice substantially outweighed its probative value.<sup>4</sup>

Defendant argues that the tape recording was not admissible because it was not an admission. Hearsay is inadmissible unless it falls within an exception provided in the rules of evidence. MRE 802; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(a); *People v Breeding*, 284 Mich App 471, 487; 772 NW2d 810 (2009). One exception to the hearsay rule is the admission of a party-opponent. MRE 801(d)(2)(A). A statement by a party is not hearsay and may be admitted for the purpose of impeachment or as substantive evidence if it is offered against the party. MRE 801(d)(2)(A); *People v Lundy*, 467 Mich 254; 650 NW2d 332

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<sup>4</sup> Because this issue was not preserved at the trial court, we review it for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To establish that plain error occurred, a defendant must show that the error was plain, and that the error affected the outcome of the proceedings. *Id.* at 763. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* at 766-767.

(2002). Contrary to defendant's argument, MRE 801(d)(2)(A) does not require that the statement of a party be an admission. As noted, the only requirements under MRE 801(d)(2)(A) are that the statement be made by a party and be offered against the party. MRE 801(d)(2)(A). Here, the victim identified defendant as the person speaking on the audio recording. The recording was offered against defendant as evidence that he sexually penetrated the victim. This is sufficient for purposes of MRE 801(d)(2)(A). The prosecution did not need to show that the statement was against defendant's interest but, were that required, the statement amounted to an implicit acknowledgement that defendant had sex with the victim.

Defendant further argues that the tape recording should not have been admitted because it was not complete. The rule of completeness states, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." MRE 106. The rule allows an adverse party to ask that additional evidence be admitted, but it does not state that incomplete evidence is inadmissible. MRE 106 has no bearing on whether evidence is admissible. *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002). Accordingly, the trial court did not err on the basis that the evidence was incomplete under MRE 106.

Defendant further asserts that the recording was irrelevant and immaterial and its probative value was substantially outweighed by unfair prejudice. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Evidence that is material and probative is relevant. *People v Sabin*, 463 Mich 43, 57; 614 NW2d 888 (2000). Material evidence need not relate to an element of the charged crime or an applicable defense, but the fact addressed by the evidence must be in issue in that it is within the range of litigated matters in controversy. *Id.* at 57. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Layher*, 464 Mich 756, 769; 631 NW2d 281 (2001). Evidence is unfairly prejudicial if there is a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010).

Here, the audio recording and written transcript of the victim's conversation with defendant were probative of whether defendant engaged in sexual penetration of the victim, an issue at the heart of the prosecution's case. Defendant's statement to the victim in response to her fears that she might be pregnant was that he could not have gotten her pregnant because he had undergone a vasectomy. Such a response makes it more likely than not that defendant sexually penetrated the victim because it implies that he and the victim had sex. Therefore, the recording was both relevant and material.

Defendant maintains that the recording was unfairly prejudicial because it was taken out of context and was misleading and confusing because it was only a portion of the conversation between defendant and the victim. Moreover, defendant argues that the tape recording does not reference a date, suggesting that defendant and the victim could have had sex after the victim turned 13 on August 16, 2008. The recording of defendant was undoubtedly prejudicial because

it amounted to probative evidence that defendant sexually penetrated the victim. However, with regard to whether the recording was confusing or misleading, defendant fails to explain an alternative interpretation for his statement to the victim that she could not be pregnant because he had undergone a vasectomy. Moreover, defendant has not demonstrated that the recording was unfairly prejudicial. The fact that no date was mentioned on the recording does not render the recording unfairly prejudicial, particularly when other evidence at trial established that the events occurred before the victim reached age 13.

In his standard 4 brief, defendant maintains that the tape recording should not have been admitted because it was not properly authenticated. Defendant improperly relies on a test delineated in *People v Karmey*, 86 Mich App 626; 273 NW2d 503 (1978), to argue that the recording lacked proper foundation. This Court held in *Karmey* that the following constitutes a proper foundation:

(1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement. [*Karmey*, 86 Mich App at 632, quoting *People v Taylor*, 18 Mich App 381, 383-384; 171 NW2d 219 (1969).]

However, this test, originally set out in *Taylor*, was superseded by the adoption of MRE 901. *People v Berkey*, 437 Mich 40, 51-52; 467 NW2d 6 (1991). To authenticate a tape recording under the current rule, a party need only show that the recording is what the party claims it to be. MRE 901; *Berkey*, 437 Mich at 52. The test from *Karmey* and *Taylor* goes to the weight of the evidence, not whether the evidence should have been admitted. *Berkey*, 437 Mich at 51.

We hold that the recording was properly authenticated. The prosecution asserted that the recording was made by Nick Larson, the victim's friend, and that it was a conversation between the victim and defendant. The victim and Nick both testified that the recording was of a conversation that defendant had with the victim while Nick was listening. Nick testified that he made the recording by using his cellular phone. This was sufficient to authenticate the recording. Accordingly, the trial court did not err when it admitted recording at trial.

#### IV. JUDICIAL IMPARTIALITY

Defendant's asserts that the trial court pierced the veil of judicial impartiality by overruling defendant's objection to a question by the prosecutor, which assumed the truth of the victim's allegations.<sup>5</sup> A trial court has wide discretion and power in the conduct of trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court's conduct pierces the veil of judicial impartiality if it unduly influences the jury and deprives the defendant of a fair

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<sup>5</sup> Because this issue was not preserved at the trial court, we review the issue for plain error. *Carines*, 460 Mich at 764.

and impartial trial. *Paquette*, 214 Mich App at 340. The following is the exchange about which defendant complains:

*Q.* [The Prosecutor] Now except for what [defendant] did to you that night did you have any reason to dislike him?

*MR. BULLOCK* [Defense Counsel]: Your Honor, I'm going to object as to that representation. That's for the jury to decide if the [d]efendant did anything.

*THE COURT*: Well it's an interesting objection but I didn't hear the question. Would you repeat the question?

*Q.* [The Prosecutor] I said except for what [defendant] did to you that night, did you have any reason to dislike him?

*MR. BULLOCK*: She doesn't know what he did. She hasn't testified that he did anything to her. So again, it's a misrepresentation of, it should be saved for closing argument.

*THE COURT*: So the objection is this is a mischaracterization of the evidence.

*MR. BULLOCK*: Of prior testimony, correct.

*THE COURT*: Overruled.

Defendant essentially argues that the trial court's decision to overrule his objection demonstrates bias against defendant and shows that the trial court believed that defendant was guilty. However, one instance of the trial court overruling a defendant's objection does not amount to judicial bias and does not result in piercing the veil of impartiality. Moreover, defendant does not explain how the trial court overruling an objection might unduly influence the jury.

Moreover, the trial court instructed the jury that it had the responsibility to reach a verdict in the case based on the evidence presented. The trial court further instructed the jury that "[l]awyer's questions to witnesses are not evidence" and "[the trial court's] comments, rulings, questions, and instructions are not evidence." Thus, the trial court essentially instructed the jury that it could not base its verdict on either the prosecutor's question or the trial court's decision to overrule defendant's objection. Jurors are presumed to follow the jury instructions, and instructions are presumed to cure most errors. *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009).

## V. PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor engaged in misconduct by vouching for the victim's credibility during her closing argument.<sup>6</sup> A prosecutor may not vouch for the credibility of a witness by suggesting that he or she has some special knowledge that the witness is testifying truthfully. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). A prosecutor may, however, argue from the facts in evidence that the defendant or another witness is worthy or not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). Moreover, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

The prosecutor did not engage in misconduct during her closing argument. The prosecutor did not improperly vouch for the victim's credibility based on the prestige of her office or undisclosed facts. Instead, the prosecutor relied on facts in evidence that the victim had never met defendant before the night in question and she got along well with defendant's brother, to argue that the victim had no motive to lie. The prosecutor properly argued that the victim was worthy of belief based on the facts in the case. Moreover, the prosecutor used the fact that the victim had undergone multiple interviews, a medical examination, and multiple trials to rebut defendant's argument that the victim did not have an opportunity to recant her story. The prosecutor did not rely on any special knowledge and properly relied on the facts in evidence in her closing arguments.

Moreover, again, jurors are presumed to have followed the jury instructions. *Chapo*, 283 Mich App at 370. Here, the trial court instructed the jury that it had the responsibility to reach a verdict in the case based on the evidence presented. It further instructed the jury that "[l]awyer's statements and arguments are not evidence but are only meant to help you understand the evidence and each side's legal theories." Accordingly, any allegation of error would have been remedied by the trial court's instructions.

Affirmed.

/s/ Douglas B. Shapiro  
/s/ Henry William Saad  
/s/ Kirsten Frank Kelly

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<sup>6</sup> Because this issue was not preserved in the trial court, this Court reviews the issue for plain error. *Carines*, 460 Mich at 764. Questions of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).